

A09-173

STATE OF MINNESOTA
IN SUPREME COURT

CURTIS R. GRAFF,

Respondent,

vs.

ROBERT M. SWENDRA AGENCY, INC.,

Appellant.

APPELLANT'S REPLY BRIEF

Attorney for Robert Swendra Agency, Inc.
Appellant

Terrence M. Gherty #0147783
GHERTY & GHERTY, S.C.
328 Vine Street
P.O. Box 190
Hudson, WI 54016
(715) 386-2332

Attorneys for Curtis R. Graff
Respondent

Martin T. Montilino
THE LAW OFFICE OF
MARTIN T. MONTILINO
3109 Hennepin Ave. S.
Minneapolis, MN 55408
(612) 236-1320

Mark R. Anfinson
Lake Calhoun Prof. Building
3109 Hennepin Ave. S.
Minneapolis, MN 55408
(612) 827-5611

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ARGUMENT

I. GRAFF'S RELEASE OF AMERICAN FAMILY ALSO RELEASED SWENDRA.

1. Graff's release of American Family released its agent, Swendra, when Swendra bound coverage.

A. An agent has no liability in tort when he bound coverage.

According to Graff, the “central defect” in Swendra’s argument is that he ignores the difference between contract law and tort law. (Respondent’s Brief (“Brief”), pp. 7, 8). In a tort claim, “[a]n agent is subject to liability to a third party harmed by the agent’s tortious conduct.” (Brief, p. 5, citing Restatement (Third) of Agency § 7.01 (2006)). This rule applies “regardless of whether the principal may also be liable.”¹ (Brief, pp. 2, 5). This rule for “torts” “differs from” the basic rule for contracts, which is, that an “agent who makes a contract on behalf of a disclosed principal does not become a party to the contract, and is not subject to liability on it, unless the agent and the third party so agree.” (Brief, p. 7, citing Restatement (Third) of Agency § 7.01, comment b). In this case, Graff brings a tort claim seeking “damages caused by the agent’s negligent failure to procure

¹ The restatement actually states that “[i]t is *ordinarily* immaterial to an agent’s liability that the agent’s tortious conduct may, additionally, subject the principal to liability.” (Emphasis added) Restatement (Third) of Agency § 7.01, comment b.

insurance.” He does not seek “coverage under the policy.” (Brief, p. 5). Swendra, therefore, cannot raise a “contract” defense to a tort claim. (Brief, pp. 6-8).

As the Restatement points out, however, “[c]ontract law and tort law may have overlapping consequences.” Restatement (Third) of Agency § 7.01, comment b. As with any tort claim, an insured must prove: (a) the existence of a duty, (b) its breach, (c) causation, and (d) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). Graff claims he was damaged because Swendra failed to procure certain coverage. Graff’s tort claim must fail, however, if the insurer is contractually obligated to provide that coverage. See *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis.2d 226, 238-239, 568 N.W.2d 31, 33 (Ct. App. 1997). As *Smith* explains:

[the insured] complains that the defendants are relying on a contract to defend a tort action. But this contention loses sight of the nature of [the insured’s] tort action against [the agent], because [the insured], himself, *must prove the absence of an insurance contract enforceable against [insurer] in order to prevail on his claim against [the agent]*.

Id. (Emphasis added). In this case, the very allegations underlying Graff’s tort claim create an enforceable contract against the insurer. Because coverage was bound, a fact that Graff has never denied, his tort claim must fail. Swendra cannot be liable for failing to procure coverage when, as a matter of law, he did procure coverage.

Graff also tries to distinguish the case of *Eddy v. Republic National Life Ins. Co.*, 290 N.W.2d 174 (Minn. 1980) on the grounds it did not involve a tort claim. Graff argues the “distinction between broker and an agent may have significance when addressing the binding effect of an agent’s actions for contract purposes, but not with respect to a direct claim against the agent or broker” for “negligence.” (Brief, p. 14). *Eddy*, therefore, “does not apply to cases like this one where the claim arises out of direct negligence by an insurance agent for failure to procure.” (Brief, p. 14).

Graff is clearly wrong. First, the existence of an enforceable contract clearly impacts Graff’s tort claim. Second, *Eddy* did involve a negligence claim against the agent. The agent, in fact, was sued “for negligence and misrepresentation.” *Eddy*, at 176. The question of whether the agent could be liable after the insurer was released, moreover, hinged squarely on the question of whether he was an “agent” of the insurer or a “broker.”

In *Eddy*, the agent promised life insurance coverage and submitted an application to the insurer. The policy the insurer issued, however, did not include a branch of the company for which the deceased worked, and the death claim was denied. In its recitation of the facts, the Court does not indicate whether the policy issued was the result of a mistake by the agent or the insurer. *Eddy*, at 175-176.

Presumably, the agent must have been at least partly responsible or there would have been no factual basis for the negligence/misrepresentation claim. The important point, however, is that the plaintiffs did exactly what Graff did here. They sued the insurer for breach and reformation of contract; and sued the agent “for negligence and misrepresentation.” *Eddy*, at 176. While the suit was pending, plaintiffs settled with the insurer, “reserving their right to continue against [the agent].” *Eddy*, at 176. The agent then moved for summary judgment arguing that because his agency status was undisputed, a “release of [the insurer] released him.” *Id.* The trial court granted the motion and dismissed the tort claim against the agent, finding there was “no issue” as to the agent’s status. This Court reversed because there was a genuine issue of fact as to the agent’s status. *Id.* at 177. The question of whether the defendant was an “agent” for the insurer or a “broker” was clearly the dispositive issue:

While it is generally the rule that an insurance company is liable for the torts of its agents when they are acting within the scope of their employment, [cites omitted], before that rule can be applied it is essential to determine whether the person claimed to be an agent was, in fact, acting in that capacity. A person who procures insurance for others can be an insurance agent, an insurance broker, or both. The essence of the difference is that whereas an insurance agent acts on behalf of a particular insurance company, an insurance broker acts on behalf of the prospective insured. In which capacity a person is acting is a question of fact. [cites omitted]. *A broker is independently liable to the insured in either contract or tort for failing to procure insurance as instructed, [cites omitted], but an agent's liability may be affected by the settlement*

of his principal. The capacity in which [the “agent”] was acting must therefore be established before the impact of [the insurer’s] settlement on his liability, if any, can be ascertained. [The “agent’s”] liability as a broker is limited to the difference between what the plaintiffs have received and the face value of the policy to which they were entitled. [cites omitted].

Since [the “agent”] may have been independently liable as a broker, which is a question for the fact finder, we reverse and remand this case.

Id. at 176-177.

The *only* claim against the agent was in tort. While *Eddy* does not articulate precisely why an insurer’s agent would not be liable, it does, in contrast, repeatedly refer to a broker’s “independent liability.” The most likely explanation is what Swendra argues here: an authorized agent who promises coverage contractually binds the insurer to provide it, and therefore the agent cannot be personally liable in tort. In any event, *Eddy* leaves no doubt that had defendant’s agency status been clear, the release of the insurer would have released the agent from the plaintiffs’ tort claim. The sole reason for the reversal was to resolve the agent/broker question. If, as Graff insists, a tort action could be brought against an agent regardless of his relationship to the insurer, the distinction between a broker and an agent would have no significance at all.

Graff also tries to distinguish *Paull* on the grounds that it was decided “well before tort actions for negligence were recognized in Minnesota” and further,

involved only a contract claim against the insurer. (Brief, p. 13). Graff cites no authority for the proposition that *Paull* was decided before tort actions against agents were possible. *Paull*, moreover, directly addressed the question of whether the insured had an independent cause of action against the agent when coverage was bound:

The above conclusion [that coverage was bound] *defeats any right of recovery of either plaintiff against [the agent]. It is plain that if the acts or conduct of the agent binds his principal, the other party to the transaction cannot hold the agent personally [liable].* [cite omitted]. There was no contract with [the agent] personally...to procure insurance, but he was requested, as agent of the insurer who had issued the policy, to consent to a change of ownership and make the needed entries on that policy protecting these plaintiffs. *The omission or mistake of [the agent] to make the agreed entries upon the policy **did no harm to either plaintiff**, for in law the company was bound as if the proper entries had been made.*

(Emphasis added). *Id.* at 541. The same rationale applies here. Whether the claim against the agent was based on contract or not, there can be no tort action when there are no causal damages.

Graff further undermines his position when he suggests that an agent could avoid liability if he “*include[ed] alternative pleadings as part of its defense, alleging that if the fact-finder would conclude that coverage was bound, the insurer is responsible for providing the requested coverage.*” (Emphasis added)

(Brief, p. 9). This contradicts Graff’s very premise that a tort claim may always be

brought against the agent, regardless of the principal's liability. Again, Graff will never be able to reconcile bound coverage on the one hand with a tort action against the agent on the other, because there are no causal damages.

B. Jury Finding/Conceded Facts

Graff next tries to side-step the contract defense by making a procedural argument. He argues the jury never made a finding that coverage was bound, and therefore it would be “improper for Appellant to argue that such a determination should simply be inferred from the verdict.” (Brief, p. 3). Swendra “never admitted binding coverage” and “adhered to this position through trial....” (Brief, pp. 17, 18). Swendra “never suggest[ed] that if [he] were found culpable, then only American Family would have financial responsibility for the loss.” (Brief, p. 18). Swendra “could have opted to conditionally concede that it agreed to provide the disputed coverage, or simply pled this in the alternative. Had the Agency done so, the question of whether American Family was contractually required to provide the additional coverage would likely have been presented to the jury.” (Brief, p. 18). To instead “wait and see whether the jury returns a verdict in the plaintiff's favor, then once it does so, reverse course and argue that it has no liability or responsibility” is “unfair to the plaintiff.” (Brief, p. 19).

As a threshold matter, Graff cannot dispute the very facts which underlie his negligence claim. The jury's verdict could have only been based on Graff's testimony that Swendra discussed UIM coverage with Graff and told him he would provide it. Had the jury not found such an agreement between Swendra and Graff, Graff's negligent procurement claim would have failed. In addition, Graff relied on these same facts in his complaint to claim Swendra did bind coverage.

The main problem with Graff's argument, however, is that it completely ignores the record. After learning of the settlement approximately a month before trial, Swendra requested a hearing to consider the impact of the release on the claim against him. The request was denied. (T. 459-460; AAD 50-AAD 51; Transcript Excerpt). Swendra then filed a Trial Memorandum asking the Court to dismiss the suit. Swendra argued that *assuming everything Graff said was true*, i.e. that Swendra did represent to Graff the umbrella policy included UIM coverage, Swendra was acting within the scope of his authority and bound the insurer. As a result, the insurer was contractually obligated to provide coverage and was thus solely responsible for paying the claim. By releasing the insurer, Graff released the agent. Alternatively, Swendra argued he had a right of indemnity against the insurer for any personal liability he may have to Graff. (AAP 18-29).

Swendra made the same argument on the morning of trial. (T. 9-19). He raised the issue again in a motion for directed verdict after Graff rested (T. 337-338), and after the close of the evidence. (T. 494-495). Each time Swendra conceded (indeed advocated), *arguendo*, that he made the representations Graff alleged. Each time the trial court took the motion under advisement. It was not until post-trial motions were heard that the issue was finally decided. (T. 575-604).

The case should have never gone to trial in the first place. It was not Swendra's choice to do so. The trial court acknowledged the motion was a question of law based upon undisputed facts. (T. 339-340). Because he was conceding Graff's own allegations for the sake of the motion, Swendra had no reason to put the coverage binding question to the jury. Graff never disputed Swendra's agency, having alleged the same in his complaint. He further stipulated to agency at trial. In short, Graff's contention that Swendra never admitted binding coverage, never conditionally conceded coverage, and was playing a game of "wait and see" with the verdict, is simply untrue. Swendra repeatedly, and clearly, conceded the facts most favorable to the plaintiff each time he moved to dismiss. The legal question was therefore ripe for decision without further findings from the jury.

C. Swendra's agency status is a conceded fact.

Without developing the argument, Graff suggests that Swendra was not an agent of American Family. He states that “[w]hile there was a stipulation at trial that the Swendra Agency was acting under an agency agreement with American Family, there was no specific stipulation that it was operating as an agent.” (Brief, p. 22). Graff then points to the written agency agreement which describes Swendra as an “independent contractor.” *Id.* Nowhere in his brief, however, does Graff dispute Swendra’s binding authority, nor the fact that coverage was bound. *Id.* Swendra’s agency status, moreover, is a conceded fact.

Graff never disputed Swendra’s agency before or during trial. Graff specifically alleged in his complaint that American Family was directly liable to him because its agent, Swendra, bound umbrella UIM coverage by agreeing to provide it (or by representing the umbrella included UIM coverage). (AAP 2 and AAP 4; Complaint, pp. 2, 4). At trial, Graff’s own expert twice agreed that Swendra was acting as an American Family agent. (T. 312, 314). Even in his post-judgment argument, Graff agreed “that Mr. Swendra was within the scope of his agency agreement at the time of the transaction.” (T. 583). Indeed, Graff argued that Swendra’s agency status was irrelevant to the postjudgment arguments. (T. 584-585).

In addition, Graff formally stipulated to agency. Swendra sought a special verdict question on his agency status. The proposed verdict read as follows:

8. Was Robert Swendra Agency, Inc. acting in the scope of its agency agreement with American Family Insurance at the time of its negligence?

(AAD 14; Postverdict Decision, p. 6 and AAP 53; Swendra's Requested Special Verdict). The trial court expressly advised Graff that if agency was disputed, he had better put in whatever evidence he had to the contrary:

MR. MONTILINO: About the agency part that I'm not going to go into in this case because it's not part of what we are trying to prove.

MR. GHERTY: I don't understand quite frankly.

MR. MONTILINO: I'm trying to prove a negligence claim. I'm not trying to prove agency or anything else.

THE COURT: No, no. *But Terry [Gherty] is right. That sounds – that's a killer if he's right. So, yeah, I think you need to develop that. I think you need to develop a record during this trial. I mean in essence it's what he's been doing for half, but yeah, I mean – but now is the time to develop it.*

MR. MONTILINO: It just seems weird because the jury is not going to decide that issue on the verdict.

THE COURT: *No, no, I'm going to decide that on a legal basis.*

MR. MONTILINO: Okay.

THE COURT: *And the facts based on the testimony and so forth and then the legal submissions afterwards. I'm just thinking that is going to be a pure legal call and there's not going to be a factual dispute, I wouldn't think.*

MR. MONTILINO: All right.

THE COURT: Obviously you guys make your own call.

MR. MONTILINO: Well, I'll just have to do some additional stuff with Swendra that I probably wouldn't do ordinarily.

THE COURT: *Yeah, I think you need to develop that.*

(Emphasis added) (T. 339-340). That evening the parties agreed to stipulate to agency. The stipulation was put on the record the following morning:

MR. GHERTY:Your honor, when we finished with Mr. Swendra yesterday when our business day ended *I at that moment thought that this morning I would ask many questions about his agency role with American Family. We've also reached a stipulation of fact and I would just want to record that now because I will be asking Mr. Swendra very few questions in light of this stipulation. So in our work last evening we agreed that we will stipulate that Robert Swendra Agency, Inc. was acting in the scope of his Agency Agreement with American Family Insurance at the time of the transactions with Curtis Graff.*

THE COURT: And more specifically *that relates to what has previously been discussed as question number 8 on the previous drafts of the special verdict form.*

MR. GHERTY: Yes. Your honor.

THE COURT: I have something for the record based on our discussions yesterday, the points I made, but anything else at this time?

MR. MONTILINO: I would agree a stipulation has been entered as outlined by defense counsel.

(Emphasis added) (T. 457-460; AAD 48-51; Transcript Excerpt). As this exchange makes clear, the purpose of the stipulation was to establish Swendra's agency without having to take additional evidence and without having to submit the question to the jury. The parties agreed there was no point to informing the jury. (T. 339-340; 460). With the agency issue resolved, Swendra's contract defense would be a question of law in the event the jury agreed with Graff's version of the facts.²

² The evidence is undisputed that American Family would have provided Graff with

Graff now tries to qualify the stipulation by arguing “there was not a specific stipulation that he [Swendra] was operating as an agent.” (Brief, p. 22). Graff also cites the “agent agreement” which designates Swendra as “an independent contractor for all purposes” and not an “employee.” (Brief, pp. 21-22). Graff knows full well, however, that the point of the stipulation was to establish Swendra’s agency and binding authority. Graff’s attempt to contest agency on appeal using an incomplete document and a partial record is particularly disingenuous when, by stipulating, he knowingly prevented a factual record from being developed,³ and knowingly caused the proposed jury verdict to be withdrawn. (T. 547). Graff is bound by the stipulation. A stipulation made by a party at trial, absent a showing of fraud, mistake, or some other justifiable reason for disregarding it, is binding on the party both at trial *and on appeal*. (Emphasis

UIM coverage had it been requested. (T. 433).

³ To the extent it was developed, the record also shows that Swendra was a “captive” agent in that he sold only American Family insurance products, and used only American Family provided forms. (T. 235, 237, 388-389). The umbrella application Graff signed, for example, was a company form that displayed both Swendra’s and American Family’s name. (T. 404, 417, 445). Swendra accepted Graff’s initial premium payments on behalf of American Family. (T. 366). Swendra used American Family’s software and had access to their mainframe. (T. 445). Swendra’s commissions were paid directly and exclusively by American Family. (T. 445). American Family also sent form letters to the customer in Swendra’s name. (T. 431). Swendra was the only American Family agent serving his town. (T. 469).

added) *Amundson v. Cloverleaf Memorial Park Association*, 221 Minn. 353, 358, 22 N.W.2d 170, 172 (1946).

Graff's reliance on the written "agent agreement," moreover, is both misplaced and misleading. For one thing, the stipulation refers to Swendra acting within the scope of his "agency agreement" as a whole, and not any particular document. Indeed, the written "*agent agreement*" itself makes clear that Swendra's actual authority is primarily determined by other documents. (Emphasis added) (Section 4(g); AAP 95). Swendra's authority to "obligate the company," for example, includes that "expressly authorized under the rules and regulations of the Company or previously authorized in writing by the Company." (Section 4(g); AAP 95). In short, the scope of Swendra's "agency agreement" is mostly defined by outside documents and company rules. For this reason alone Graff's reference to the "agent agreement" must be rejected.

In any event, the "agent agreement" expressly establishes an agency relationship. While Swendra is not an employee of the company, he is an agent. The "agent agreement" is entitled: "American Family *Agent Agreement*." (Emphasis added) (APP 94). It defines "you" as "the *agent* named on page one of the agreement." (Sec. 1(1); APP 95). It further states, referring to Swendra, that "[y]ou shall not represent the Company *as agent* under this agreement *until* you are

licensed to act as an insurance agent....” (Emphasis added) (Sec. 1(2); AAP 95). Swendra’s agency, moreover, is exclusive. He may only sell American Family products. (Sec. 4(a); AAP 95).

In summary, Graff never disputed Swendra’s agency or his authority to bind American Family. Indeed, he alleged Swendra’s authority to bind in his complaint. In addition, Graff stipulated at trial, in lieu of testimony and in lieu of a jury question, that Swendra “*was acting in the scope of his Agency Agreement with American Family Insurance at the time of the transactions with Curtis Graff.*” (T. 457-8). Finally, even if one considers the partial record and in particular the written “agent agreement,” Swendra’s “agent” status is clearly established.

D. A Pierringer release does not create the right to a cause of action.

Graff provides a lengthy discussion of the effect a *Pierringer* release has on the non-settling party, repeating his mantra that Swendra will only be held responsible for the “losses attributable to his own negligent actions.” (Brief, p. 8). This discussion has no bearing on the issues in this case. A *Pierringer* release neither creates rights for the plaintiff nor takes them away from the defendant. *Hoffman v. Wiltscheck*, 411 N.W.2d 923, 926-7 (Minn. App. 1987). As such, *Pierringer* has no bearing on whether Graff can bring an action in tort against Swendra when coverage was bound. For the same reasons, Graff’s policy

arguments are irrelevant. (See Brief, pp. 6, 9, 10 & 11). The policy of encouraging settlements, for example, does not constitute a legal basis for creating a cause of action where none otherwise exists, in order to avoid “complex legal distinctions.” (Brief, pp. 10-11). Graff pled the case properly: he alleged that coverage was bound, and alternatively, that the agent was negligent. That way, if the agent had exceeded his authority, and either did not or inadequately bound coverage, the claim against the agent could have been pursued and the agent’s failure to obtain promised coverage (whatever the reason) would have been causal. Graff concedes that a contract defense was potentially viable, in that Swendra could have “include[ed] alternative pleadings as part of its defense, alleging that if the fact-finder would conclude that coverage was bound, the insurer is responsible for providing the requested coverage.” (Brief, pp. 9, 18). By removing the first cause of action from the equation, however, Graff knowingly placed himself in the position where the case would rise or fall on whether his claim against Swendra could be independently sustained. (Brief, p. 9). Graff, in effect, caused his own loss when he settled with American Family for far less than they were legally liable.

E. Graff fails to distinguish supporting case law.

Graff next asserts that “no prior MN decisions...contain sufficiently similar facts to be considered controlling precedent in this case.” (Brief, p. 11). Further, that “[n]either *Anderson, Paull, Julien, Eddy*, nor any other decision cited by Appellant directs that an insurance agency may not be held accountable for its own specific percentage of fault in an action for negligence.” (Brief, p. 15). Again, Graff is wrong. *Paull*, discussed *supra*, clearly states “that if the acts or conduct of the agent binds his principal, *the other party to the transaction cannot hold the agent personally [liable]. Paull*, at 541. *Eddy*, also discussed *supra*, clearly implies the same, and also involves the specific circumstance of a released insurer and a remaining tort claim against the agent. The other cases Swendra cites⁴ all stand for the proposition that when an insurer’s authorized agent makes oral representations to an insured about coverage, he creates a contract the insurer is legally obligated to perform. The insurer, moreover, may not seek indemnification from the agent. The importance of these holdings is that they neutralize the elements of any tort claim against the agent. As there is no loss, there can be no

⁴ See e.g. *Anderson v. Minnesota Mut. Fire and Cas. Co.*, 399 N.W.2d 233 (Minn. App. 1987); *Julien v. Spring Lake Park Agency, Inc.*, 283 Minn. 101, 104-105, 166 N.W.2d 355, 357 (1969); *Reserve Ins. Co. v. Netzer*, 621 F.2d 314 (8th Cir. 1980); *Morrison v. Swenson*, 274 Minn. 127, 135, 142 N.W.2d 640, 645 (1966); *Frank v. Winter*, 528 N.W.2d 910, 914 (Minn. App. 1995).

cause of action in tort against the agent. Rather than address how these cases may or may not apply, Graff simply nitpicks at factual differences that do nothing to undermine the central holdings.

Graff also cites two Wisconsin cases in support of his argument: *Schurman v. Neau*, 2001 WI App 4, 240 Wis.2d 719, 624 N.W.2d 157; *Appleton Chinese Food Service, Inc. v. Murkern Ins., Inc.*, 185 Wis.2d 791, 519 N.W.2d 674 (1994). Neither of these cases, however, is helpful to his argument.

The *Schurman* case was discussed at length in Swendra's brief-in-chief. (See e.g. pp. 32-33). That discussion will not be repeated here. Suffice it to say that *Schurman* involves an agent, possibly a broker (a distinction that was never clarified), who promised the insured a life insurance payout that was greater than the insured was qualified by the insurer to receive. *Id.* at ¶11. The insured's heirs sued the agent for intentional misrepresentation. The court found the insured was entitled to the benefit of his bargain. The "agent" was liable for what he had promised, minus what the insurer would pay. *Id.* at ¶4, 15. *Schurman*, therefore, does not involve a situation where the agent bound the insurer to provide the same coverage the agent promised. Interestingly, *Schurman* also cites *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis.2d 226, 231, 568 N.W.2d 31, 33 (Ct. App. 1997) for the proposition that no cause of action lies against an agent when the insurer is

obligated to provide the same coverage the insured requested of the agent.

Schurman, at ¶9, n. 3.

Graff also cites *Appleton Chinese Food* for the proposition that an agent may be sued in tort when the insurer is released. Graff fails, however, to take heed of a critical distinction. The court specifically found that the “agent” was, in effect, a “broker” for the insured. *Id.* at 802, 805-806. As the Court noted: “[w]e do not look to [the “agent”]...as [the insurer’s] agent for contract purposes.” *Id.* at 805. In addition, *the agent’s “negligence in completing applications for estimates occurred before the [insureds] were bound to [the insurer].* *Id.* (Emphasis added). The court also points out that an agent is not liable in tort when he “effects a binding contract of insurance that conforms to the agreement between the agent and the insured...” *Id.* at 678. Here, in contrast, coverage was bound when the oral representation was made.

2. Alternatively, circular indemnity releases Swendra.

Graff argues there is no circular indemnity because “a principal’s duty to indemnify does not extend to losses resulting from an agent’s own negligence.” (Brief, p. 26). As the “losses claimed against the Swendra Agency are solely attributable to its own negligence,” American Family “had no obligation to indemnify the Agency for the claims brought by Graff based upon the agency’s

own fault [absent an agreement or other special circumstance].” (Brief, p. 27).

Graff cites *Shair-A-Plane v. Harrison*, 189 N.W.2d 25, 27-28 (Minn. 1971) for the proposition that: “we know of no rule of law whereby, absent an express agreement to the contrary, a duty of indemnity is imposed upon a principal for losses incurred due to the agent’s fault.” (Brief, p. 26).

Again, Graff’s argument merely begs the question of whether his losses were *caused* by Swendra’s “negligence.” For the reasons previously argued, Swendra caused Graff no loss because, assuming what Graff says is true, Swendra bound coverage. See *Paull*, at 451 (“The omission or mistake of [the agent] to make the agreed entries upon the policy *did no harm to either plaintiff*, for in law the company was bound as if the proper entries had been made.” (Emphasis added)); *Smith*, at 238-239 (insured “must prove the absence of an insurance contract enforceable against [insurer] in order to prevail on his claim against [the agent].)

The facts of *Shair-A-Plane*, moreover, could not be more distinguishable. In that case, a borrowed helicopter crashed while being flown by a volunteer pilot helping the county sheriff with water patrol. The issue was whether the pilot was entitled to indemnity from the county for the damages he caused the owner of the helicopter. The Court found that no indemnity agreement between the pilot and the county was express or implied. The pilot was not an employee of the county, nor

could he prove that the loss of the helicopter “was a consequence of a lawful act done *pursuant to the authority conferred upon [the pilot] by the county* and was not caused solely by [the pilot’s] own misconduct.” (Emphasis added) *Shair-A-Plane*, at 27. Contrary to Graff’s assertion, the general rule in Minnesota is an implied promise of indemnity from a principal to his agent for any damages resulting from the good faith execution of that agency. *Hill v. Okay Construction Co., Inc.*, 312 Minn. 324, 252 N.W.2d. 107, 120 (Minn. 1977). *Shair-A-Plane* is clearly distinguishable in that neither agency nor good faith execution of that agency were established. In contrast, Swendra was a duly authorized agent of his principal, American Family, acting within the scope of his express authority.

In addition, the only way to reconcile the holdings in *Paull, Eddy, Anderson, Julien*, and *Reserve*, with, *arguendo*, the right to an independent action against the agent, would be to require the insurer to indemnify the agent in the event he is found liable. Graff correctly points out that the cases cited by Swendra—see e.g. *Anderson*, at 235; *Julien*, at 357; and *Reserve*, at 316—decide whether *an insurer* is entitled to indemnity *from the agent* when the agent binds coverage. The answer is that the insurer has no indemnification remedy against an agent who acts within his authority because the insurer did not, in fact, suffer any loss. Had Graff successfully pursued his claim against American Family, for example, American

Family would have been required to pay the entire claim without a right of indemnification against Swendra.

Nonetheless, Graff argues that Swendra is on the hook for the entire judgment, with no right of indemnity from his principal, simply because Graff settled with American Family for less than the contract amount and sued Swendra in tort. It makes no logical sense, however, that an agent can bind the insurer to provide coverage without being subject to an indemnity claim; but at the same time, he can be sued directly by the insured and be required to pay the insurer's entire obligation without any further recourse. The result would be *de facto* indemnification for the insurer. The only logical result, consistent with common law, is that an agent who contractually binds his principal while acting within the scope of his authority retains an implied promise of indemnity.

Because Swendra would be entitled to indemnity from American Family, and the release requires Graff to indemnify American Family for any claim against it, indemnity is circular. For this alternative reason Graff's claim against Swendra fails.

II. THE TRIAL COURT DID NOT PROPERLY APPLY THE COLLATERAL SOURCE STATUTE (MINN. STAT. § 548.251) WHEN IT EXCLUDED "ATTORNEYS FEES" FROM THE WORKER'S COMPENSATION PAYMENT GRAFF RECEIVED FOR FUTURE WAGE LOSS BENEFITS AND MEDICAL EXPENSES.

According to Graff, the trial court properly excluded attorney's fees from the worker's compensation payouts because he did not receive a double recovery. There was no double recovery because "[t]hose attorney's fees were not received by Graff, but by his attorneys." (Brief, p. 29). Graff cites no direct authority to support his argument.

Minn. Stat. § 548.251 provides no exception for subtracting attorneys fees from an otherwise qualified collateral source. The trial court, moreover, did not subtract attorney's fees from either the \$30,000.00 tortfeasor settlement or the \$100,000 UIM settlement from American Family. See e.g. *Do v. American Family Mut. Ins. Co.*, 752 N.W.2d 109, 114 (Minn. Ct. App. 2008), and the cases cited therein (Full amount of prior settlement with tortfeasor deductible under Minn. Stat. § 548.251 by UIM insurer). As there is no legal basis for subtracting attorney's fees from a tortfeasor or UIM settlement, there is likewise no legal basis for subtracting attorney's fees from a worker's compensation settlement. Both are qualified collateral source payments under Minn. Stat. § 548.251 and must be deducted in full.

CONCLUSION

The parties stipulated at trial that Swendra was an agent of American Family and was acting within his scope of authority when he told Graff the umbrella

contained UIM coverage. Under Minnesota law, an agent's oral representations as to coverage bind the insurer when the agent acts within the scope of his or her authority.

Consistent with Graff's testimony, implicit in the jury verdict, and conceded by Swendra for the purposes of his motion to dismiss, is the finding that Swendra bound UIM coverage by his representations to Graff. Because Swendra's oral representations created a binding contract between Graff and American Family, there was no failure to procure. Graff was covered as a matter of law. Swendra, therefore, did not cause Graff any damages. Any failure on Swendra's part to comply with American Family's internal procedures for procuring coverage is a matter strictly between Swendra and his principal. Once bound by its agent, moreover, American Family was exclusively responsible for paying the claim. The release of American Family therefore ended the lawsuit as it eliminated the only liable party.

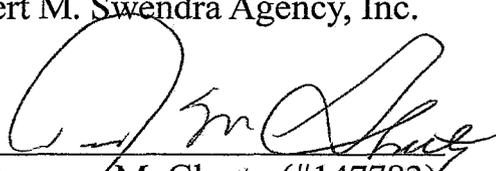
Alternatively, because Swendra is entitled to indemnification from American Family for any damages he must pay; and pursuant to the release, Graff must reimburse American Family for anything it must pay to Swendra; circular indemnity offsets any recovery Graff may receive from Swendra and thereby effectively releases him.

The judgment against Swendra should be reversed and Graff's claim dismissed. In the event the court does not reverse the judgment and dismiss the claim against Swendra, it should remand and order the trial court to subtract \$10,656.80 from the judgment pursuant to Minn. Stat. § 548.251.

Respectfully submitted this 3 day of June, 2010.

GHERTY & GHERTY, S.C.
Attorneys for Appellant
Robert M. Swendra Agency, Inc.

By


Terrence M. Gherty (#147783)
328 Vine Street
P.O. Box 190
Hudson, WI 54016
(715) 386-2332

A09-173
STATE OF MINNESOTA
IN SUPREME COURT

CURTIS R. GRAFF,

Respondent,

vs.

ROBERT M. SWENDRA AGENCY, INC,

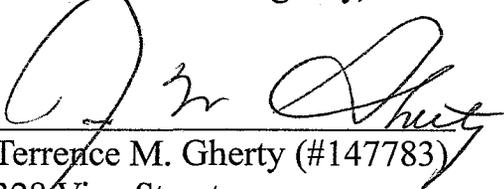
Appellant,

CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds, 1 and 3, for a brief produced with a proportional font. The length of the brief is 5,676 words. This brief was prepared using Microsoft Office Word 2003.

Dated this 3 day of June, 2010

GHERTY & GHERTY, S.C.
Attorneys for Appellant
Robert M. Swendra Agency, Inc.

By 

Terrence M. Gherty (#147783)
328 Vine Street
P.O. Box 190
Hudson, WI 54016
(715) 386-2332